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Atty. Docket No. GOR05/P300A

CERTIFICATE OF MAILING

I hereby certify that this paper, together with all enclosures identified herein, are being deposited with the United States Postal Service as first class mail, addressed to the Mail Stop Appeal Brief - Patents, Commissioner for Patents, P.O. Box 1450, Alexandria, Virginia 22313-1450, on the date indicated below.

June 7, 2004
Date


Petie Taylor

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES**

Art Unit : 3611
Examiner : Brian K. Green
Applicant : Gigi C. Gordon
Appln. No. : 09/805,313
Filing Date : March 13, 2001
Confirmation No. : 1788
For : CLEANING ARTICLES

Mail Stop Appeal Brief - Patents
Commissioner For Patents
P.O. Box 1450
Alexandria, Virginia 22313-1450

TRANSMITTAL OF APPEAL BRIEF
(PATENT APPLICATION - 37 CFR §1.192)

1. Transmitted herewith, in triplicate, is the APPELLANT'S BRIEF in this application, with respect to the Notice of Appeal filed on April 8, 2004.

2. **STATUS OF APPLICANTS**

This application is on behalf of:

 other than a small entity.

 X a small entity.

A verified statement:

 is attached.

 X was already filed.

3. **FEE FOR FILING APPEAL BRIEF**

Pursuant to 37 CFR §1.17(c), the fee for filing the Appeal Brief is:

 X small entity \$165.00

 other than a small entity \$330.00

Appeal Brief fee due: \$ \$165.00

4. **EXTENSION OF TERM**

The proceedings herein are for a patent application and the provisions of 37 CFR §1.136 apply.

(complete (a) or (b), as applicable)

(a) Applicant petitions for an extension of time under 37 CFR §1.136:

<u>Extension (months)</u>	<u>Fee for other than small entity</u>	<u>Fee for small entity</u>
<u> </u> one month	\$110.00	\$55.00
<u> </u> two months	\$420.00	\$210.00
<u> </u> three months	\$950.00	\$475.00
<u> </u> four months	\$1480.00	\$740.00

FEE: \$

If an additional extension of time is required, please consider this a petition therefor.

(check and complete the next item, if applicable)

 An extension for months has already been secured, and the fee paid therefor of \$ is deducted from the total fee due for the total months of extension now requested.

Extension fee due with this request: \$

or

(b) X Applicant believes that no extension of term is required. However, this conditional petition is being made to provide for the possibility that applicant has inadvertently overlooked the need for a petition and fee for extension of time.

5. **TOTAL FEE DUE**

The total fee due is:

Appeal Brief fee:	\$	165.00
Extension fee (if any)	\$	
TOTAL FEE DUE:	\$	165.00

6. FEE PAYMENT

X Attached is a check in the sum of \$165.00.

___ Charge Account No. 16 2463 the sum of \$ _____.
A duplicate of this transmittal is attached.

7. FEE DEFICIENCY

X If any additional extension and/or fee is required, this is a request therefor
and to charge Account No. 16 2463.

and/or

X If any additional fee for claims is required, charge Account No.
16 2463.

Respectfully submitted,

GIGI C, GORDON

By: PRICE, HENEVELD, COOPER, DEWITT & LITTON, LLP

June 7, 2007
Date

Steven L. Underwood
Steven L. Underwood
Registration No. 35 727
695 Kenmoor Avenue SE, P.O. Box 2567
Grand Rapids, Michigan 49501
(616) 949-9610

SLU/p



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APPELLANT'S BRIEF (37 CFR §1.192)

This brief is in furtherance of the Notice of Appeal, filed in this case on April 7, 2004.

The fees required under §1.17(c), and any required petition for extension of time for filing this brief and fees therefor, are dealt with in the accompanying TRANSMITTAL OF APPEAL BRIEF.

This brief is transmitted in triplicate. (37 CFR §1.192(a)).

This brief contains these items under the following headings and in the order set forth below (37 CFR §1.192(c)):

- I. Real Party in Interest (37 CFR §1.192(c)(1))
- II. Related Appeals and Interferences (37 CFR §1.192(c)(2))
- III. Status of Claims (37 CFR §1.192(c)(3))
- IV. Status of Amendments (37 CFR §1.192(c)(4))
- V. Summary of the Invention (37 CFR §1.192(c)(5))
- VI. The Examiner's Rejections
- VII. The Prior Art
- VIII. The Examiner's Arguments
- IX. Issues (37 CFR §1.192(c)(6))
- X. Grouping of Claims (37 CFR §1.192(c)(7))
- XI. Arguments (37 CFR §1.192(c)(8))

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XII. Conclusion

Appendix of Claims Involved in the Appeal (37 CFR §1.192(c)(9))

The final page of this brief bears the attorney's signature.

I. Real Party in Interest

The real party in interest in this application is Gigi C. Gordon, the sole named inventor.

II. Related Appeals and Interferences

There are no other appeals or interferences known to Applicant, the Applicant's local representative, or Assignee which will directly affect or be directly affected by or have a bearing on the Board's decision and pending appeal.

III. Status of Claims

This is an appeal to the Board of Patent Appeals and Interferences from the decision of the Primary Examiner dated January 9, 2004, finally rejecting claims 1-18, which are pending in the above-identified patent application.

Claims 1-17 were presented in the application as filed.

In the first Office Action (Paper No. 4, September 26, 2001), claims 15-17 were rejected under 35 U.S.C. §112, and claims 1-17 were rejected under 35 U.S.C. §103. Claims 1-17 were also rejected under the judicially created doctrine of non-statutory double patenting.

Pursuant to 37 C.F.R. §1.111, a response to the first Office Action on the merits was filed on December 26, 2001. Claims 15, 16 and 17 were amended and a terminal disclaimer was filed.

In the second Office Action (April 16, 2002), claims 1-17 were again rejected under 35 U.S.C. §103.

Pursuant to 37 C.F.R. §1.111, a response to the second Office Action on the merits was filed on July 16, 2002. Therein, claim 18 was added.

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In the third Office Action (September 23, 2003), claims 1-18 were rejected under 35 U.S.C. §112 and claims 1-3, 6-9, and 14-18 were rejected under 35 U.S.C. §102. The remaining claims were rejected under 35 U.S.C. §103.

Pursuant to 37 C.F.R. §1.111, a response to the third Office Action on the merits was filed on December 23, 2002. Claims 1, 6, 14 and 18 were amended.

In the fourth Office Action (March 4, 2003), claims 1-18 were again rejected under 35 U.S.C. §112 and claims 1-3, 6-9, and 14-18 were again rejected under 35 U.S.C. §102. The remaining claims were again rejected under 35 U.S.C. §103.

Pursuant to 37 C.F.R. §1.111, a response to the fourth Office Action on the merits was filed on June 3, 2003. Claims 1, 6, 14 and 18 were again amended.

In the fifth Office Action (July 17, 2003), claims 1-18 were rejected under 35 U.S.C. §112 and under 35 U.S.C. §103(a).

Pursuant to 37 C.F.R. §1.111, a response to the fifth Office Action on the merits was filed on October 16, 2003. Claims 1, 6, 14 and 18 were yet again amended.

In the sixth Office Action (January 9, 2004), claims 1-18 were rejected under 35 U.S.C. §103.

Pursuant to 37 C.F.R. §1.111, a response to the sixth Office Action on the merits was filed on March 2, 2004. None of claims 1-18 were amended.

Therefore, claims 1-18 currently remain in the present application. A copy of the claims 1-18 on appeal is provided in the attached Appendix A.

IV. Status of Amendments

Pursuant to 37 C.F.R. §1.116, in response to the sixth Office Action on the merits, no new claims were added and no claims were amended. Therefore, claims 1-18 remain as last amended by the Applicants by October 16, 2003.

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V. Summary of the Invention

The present invention concerns an identification system for identifying and distinguishing individual cleaning articles. Each of the cleaning articles is intended to clean a dedicated and specific surface, such as those typically found in households, selected from a group consisting essentially of dishes, glassware, cooking pots and pans, kitchen counters, kitchen cabinets, kitchen sinks, dining tables and other surfaces that are used during the food preparation process, toilets, tubs, sinks, floors, walls, cars, boats, windows and tables. Each of the claimed cleaning articles is selected from the group consisting essentially of sponges, wipes, towels, rags, cloths, blotters and metallic and non-metallic scrubbers. The identification system includes a plurality of such cleaning articles, where each cleaning article is intended for and corresponds to a different specific intended cleaning application. To accomplish this goal, each of the cleaning articles has an external surface upon which is disposed a cleaning surface corresponding to the specific intended cleaning application and is provided with identifying indicia. The identifying indicia constitutes and provides a visually distinguishing external feature for specifically identifying the specific intended cleaning application of each of the plurality of cleaning articles. The identifying indicia distinguishes each of the cleaning articles one from another and specifies the specific intended cleaning application of each of the plurality of cleaning articles. Accordingly, the risk of cross-contamination, particularly food borne cross-contamination issues in the kitchen, is substantially minimized.

VI. The Examiner's Rejections

The Examiner finally rejected claims 1-3, 6-10, 12, and 14-18 under 35 U.S.C. §103(a) as unpatentable over *Carter et al.* (U.S. Patent No. 4,702,381). The Examiner finally rejected claim 4 under 35 U.S.C. §103(a) as unpatentable over *Carter et al.* in further view of *Pirraglia et al.* (U.S. Patent No. D390,403). The Examiner finally rejected Claims 5 and 13 under 35 U.S.C. §103(a) as unpatentable over *Carter et al.* in further view of *Inteso* (U.S. Patent No. 4,598,488). The Examiner finally rejected claims 5, 11 and 13 under 35 U.S.C.

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§103(a) as unpatentable over *Carter et al.*, in further in view of *Brach Jr. et al.* (U.S. Patent No. 5,487,203). The Examiner finally rejected claims 1-3, 6-10, 12 and 14-18 under 35 U.S.C. §103(a) as unpatentable over “Scotch-Brite” pads. The Examiner finally rejected claim 4 under 35 U.S.C. §103(a) as unpatentable over “Scotch-Brite” pads in view of *Demner* (U.S. Patent No. 3,496,589). The Examiner finally rejected claims 5 and 13 under 35 U.S.C. §103(a) as unpatentable over “Scotch-Brite” pads in further view of *Rogers et al.* (U.S. Patent No. 5,133,707). The Examiner finally rejected claims 5, 11 and 13 under 35 U.S.C. §103(a) as unpatentable over “Scotch-Brite” pads in further view of *Brach Jr. et al.*

VII. The Prior Art

A. *Carter et al.*, U.S. Patent No. 4,702,381

Carter et al. discloses a system for displaying but protecting during such display bath and hand and kitchen towels and the like, including a towel bar and protective cover sized to match the bar. Engraved or other indicia on the protective cover of the towel may be used for identification of the particular type or purpose of the towel protected. Figs. 1 and 2 show a single towel bearing “HIS” embroidered thereon. *Carter et al.* does not indicate that the intended cleaning application for the article disclosed therein would be associated with cleaning a surface selected from a group consisting essentially of dishes, glassware, cooking pots and pans, kitchen counters, kitchen cabinets, kitchen sinks, dining tables and other surfaces that are used during the food preparation process, toilets, tubs, sinks, floors, walls, autos, boats, windows and furniture, as presently claimed.

B. *Pirraglia et al.*, U.S. Patent No. D390,4

Pirraglia et al. discloses a single bath towel in the shape of and bearing an image of a single angel.

C. *Inteso*, U.S. Patent No. 4,598,488

Inteso discloses an embroidery frame for embroidering raised images.

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D. Brach, Jr. et al., U.S. Patent No. 5,487,203

Brach, Jr. et al. discloses a squeegee having a handle adapted to display advertising indicia, including raised indicia.

E. "Scotch Brite" Pad

"Scotch Brite" Pad is a scour pad manufactured by or for 3M Home & Commercial Care Products. The pad itself has only "Scotch-Brite" printed on one side and bears no indicia of its intended use. The packaging for the pad, which is discarded after the first use of the pad, states: "Try on all heavy duty jobs like cast iron pots, stove burners, broilers, garden tools, grates grills, and white wall tires." Four pictographs on the packaging indicate a cook top, a pot, a broiler pan and utensils. The packaging also states: "Try other Scotch-Brite™ products!," indicating the availability of a "Kitchen scrub sponge," a "Household scrub sponge, a "Cookware scrub sponge," and a "Tub & Sink scrub sponge." There is no indication that these other available products have anything printed thereon.

F. Demner, U.S. Patent No. 3,496,589

Demner discloses a dog shampoo devise comprising a flexible rubbery polyurethane foam impregnated with an insecticidal composition, having the outline and imprint of a picture of a basset hound.

G. Rogers et al., U.S. Patent No. 5,133,707

Rogers et al. discloses a composite adhesive fastening tape and tape system for interconnecting printed surfaces. *Rogers et al.* teaches applying an embossed indicia to the tape.

H. The Remaining References

The remaining references of record have not been specifically applied by the Examiner to the rejected claims, and are believed to be not sufficiently related to the appealed claims to warrant separate discussion.

VIII. The Examiner's Arguments

In this section, Applicants will attempt to fairly summarize the Examiner's arguments, as presented in the sixth and final Office Action. The Examiner's arguments throughout the prosecution regarding the prior art have been nearly identical.

A. Obviousness Under 35 U.S.C. §103(a) in View of *Carter et al.*

The Examiner rejected claims 1-3, 6-10, 12, and 14-18 under 35 U.S.C. §103(a) as being obvious over *Carter et al.* The Examiner noted that *Carter et al.* discloses a towel with "HIS" thereon. The Examiner admitted that *Carter et al.* does not disclose the use of two or more towels, but nevertheless contended that Fig. 2 teaches "the idea" of labeling a towel with "HIS" or "HERS" to indicate what surface (person) the towel is to be used on. The Examiner considered the indicia thereon to be the indicia indicating articles to be cleaned, i.e., a man's body, face, etc., and a lady's body, face, etc. The Examiner further noted, without support in the reference or otherwise in the record, that these towels can be used for cleaning the man's or ladies' hands, body, face, car, shoes, bathroom, sinks, counters, walls floors, etc.

B. Obviousness Under 35 U.S.C. §103 Over *Carter et al.* In View of *Pirraglia et al.*

The Examiner rejected claim 4 under *Carter et al.*, as discussed above, and in further view of *Pirraglia et al.* under 35 U.S.C. §103(a), contending that the latter reference shows the idea of making the outline of a towel in the shape of a person or an object.

C. Obviousness Under 35 U.S.C. Over *Carter et al.* In View of *Inteso*

The Examiner rejected claims 5 and 13 under 35 U.S.C. as being unpatentable over *Carter et al.* as applied above, and in further view of *Inteso*. The Examiner noted that it would have been obvious in view of the raised embroidery of *Inteso* to modify *Carter et al.* by making the indicia raised.

D. Obviousness Under 35 U.S.C. 103 Over *Carter et al.* In View of *Brach Jr., et al.*

The Examiner rejected claims 5, 11 and 13 under 35 U.S.C. §103(a) as being unpatentable over *Carter et al.*, as applied above and in further view of *Brach Jr., et al.* The Examiner contended that *Brach Jr., et al.* further teaches the idea of making the indicia raised,

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which would create a more aesthetically pleasing display. Moreover, the Examiner contended that *Brach Jr., et al.* teaches the idea of making the indicia recessed, which the Examiner likewise contended would be a more aesthetic display.

E. Obviousness Over 35 U.S.C. §103 Under “Scotch-Brite” Pads

The Examiner rejected claims 1-3, 6-10, 12 and 14-18 under 35 U.S.C. §103(a) as being unpatentable over “Scotch-Brite” scour pads with indicia. The Examiner contended that the “Scotch-Brite” scour pads teaches a scouring pad with indicia thereon. The Examiner notes that the “Scotch-Brite” scour pads also indicates that another product, “Scotch-Brite” cookware sponge, could be used on tubs. The Examiner admitted that the “Scotch-Brite” scour pads, however, do not specifically show a second cleaning article for cleaning a different article. However, the Examiner considered it obvious to one with ordinary skill in the art to modify the “Scotch-Brite” scour pads with indicia by adding a “Scotch-Brite” cookware sponge, since this would allow a wider range of articles to be properly cleaned within a household. With regard to claim 10, the Examiner further noted that while the “Scotch-Brite” scour pads do not disclose whether the indicia has color which is different than the color of the pad, it would have been obvious to do so.

F. Obviousness Under 35 U.S.C. Over “Scotch-Brite” In View of *Demner*

The Examiner rejected claim 4 under 35 U.S.C. §103(a) as unpatentable over “Scotch-Brite” as set forth above, in further view of *Demner*, showing the outline of the cleaning article in the shape of the article to be cleaned.

G. Obviousness Under 35 U.S.C. Under “Scotch-Brite” In Further View of *Rogers et al.*

The Examiner rejected claims 5 and 13 under 35 U.S.C. §103(a) as unpatentable over “Scotch-Brite” in further view of *Rogers et al.* The Examiner applied the “Scotch-Brite” reference as disclosed above, but that did not disclose the idea of making the indicia raised. The Examiner noted that *Rogers et al.* teaches the idea of embossing the indicia on a sheet. In view of *Rogers et al.*, the Examiner contended it would have been obvious to one with skill in the art to modify the “Scotch-Brite” pads by making the indicia raised.

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H. Obviousness Over 35 U.S.C. §103(a) Under “Scotch-Brite” In View of *Brach Jr. et al.*

The Examiner rejected claims 5, 11 and 13 under 35 U.S.C. §103 as being unpatentable over “Scotch-Brite” as applied above in further view of *Brach Jr. et al.* *Brach Jr. et al.* was asserted as disclosing the idea of making raised or recessed indicia to create a more aesthetically pleasing display.

IX. **Issues**

The rejections advanced by the Examiner raise a number of issues:

- 1) Whether *Carter et al.* alone renders Claims 1-3, 6-10, 12, and 14-18 obvious.
- 2) Whether any of the remaining cited references, either combined with *Carter et al.* or otherwise in proper combination, teach the identification system which is claimed herein.
- 3) Whether any of the cited references in fact teach away from the identification system that which is claimed herein.
- 4) Whether, even if combined, the references as cited would render obvious the identification system that which is claimed herein.
- 5) Whether objective evidence of non-obviousness overcomes the rejections for obviousness.

X. **Grouping of Claims**

Applicants submit that claims 1-18 stand or fall together.

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XI. Arguments

Issue 1:

1) Whether *Carter et al.* alone renders Claims 1-3, 6-10, 12, and 14-18 obvious.

The Examiner has incorrectly asserted *Carter et al.* alone, as this reference fails to teach, motivate or suggest the claims at issue. The relevant portion of 35 U.S.C. §103(a) reads as follows:

A patent may not be obtained though the invention is not identically disclosed or described as set forth in §102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made a person having ordinary skill in the art to which said subject matter pertains.

In view of this standard, *Carter et al.* utterly fails to indicate that the intended cleaning application for the article disclosed therein would be even remotely associated with cleaning a surface selected from a group consisting essentially of dishes, glassware, cooking pots and pans, kitchen counters, kitchen cabinets, kitchen sinks, dining tables and other surfaces that are used during the food preparation process, toilets, tubs, sinks, floors, walls, autos, boats, windows and furniture, as presently claimed.

When a consumer purchases a towel as disclosed by *Carter et al.*, such towels do not come with instructions about how or where to clean with them. A towel as disclosed by *Carter et al.*, rather, is meant to be placed in the bathroom for a couple, married or otherwise, and are decorative in nature. They have never been sold as a cleaning identification system. The towel of *Carter et al.* plainly does not serve the same purpose as the present invention. Rather, the towel of *Carter et al.* is akin to underwear with the days of the week on them, socks with an engraved logo on them, or a fraternity/sorority jacket with personal names on them. None of these things addresses a system for cleaning household/industrial fixtures.

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Therefore, the only similarity that the towel disclosed by *Carter et al.* may have with the present invention is that a word is written on it. Yet the words used for the present invention have a very different purpose and function, that is, to enable to user to use the items throughout the house, business, or institution for specific cleaning tasks, unlike the towel disclosed by *Carter et al.* Indeed, the Examiner refers to nothing suggesting that the towel disclosed by *Carter et al.* has ever been sold as a part of a cleaning system. Instead, the cited prior art is for personal use and/or decorative purposes.

The towel disclosed by *Carter et al.* thus differs from the present claimed invention in at least the following aspects:

1. The towel disclosed by *Carter et al.* does not identify a cleaning identification system for households or institutions.
2. The towel disclosed by *Carter et al.* does not disclose a system that addresses food borne cross-contamination issues in kitchen.
3. The towel disclosed by *Carter et al.* is not used to identify specific cleaning tasks for bathroom, kitchen, or other household fixtures or furniture.
4. The towel disclosed by *Carter et al.* does not have a specific purpose that includes cleaning areas in the home or business for specific purposes.
5. The towel disclosed by *Carter et al.* is purely for personal use; it is not for cleaning kitchen and bathroom fixtures.

Moreover, the reference also does not teach a plurality of cleaning articles. As the Examiner conceded, it discloses only one towel and provides no teaching of using the indicia (32) to distinguish one cleaning application from another. Certainly, the reference does not teach a plurality of cleaning articles, each having a different indicia corresponding to a different intended cleaning application to clean a surface selected from a group consisting essentially of dishes, glassware, cooking pots and pans, kitchen counters, kitchen cabinets, kitchen sinks, dining tables and other surfaces that are used during the food preparation process, toilets, tubs, sinks, floors, walls, autos, boats, windows and furniture. There is no basis whatever in the reference or in any other art of record that one would provide a plurality

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of such cleaning articles in the identification system set forth in the presently claimed invention.

The Examiner's comments that the towel of *Carter et al.* could be used to clean cars, shoes, bathrooms, sinks, counters, walls, floors, etc. misses the point -- *Carter et al.* does not distinguish between cleaning articles to clean different surfaces. The towel of *Carter et al.* does not say "floor." Rather, the single towel only says "HIS." The crux of the present invention claimed herein is that the indicia have some relation to the surface to be cleaned and that various surfaces may be involved. *Carter et al.* entirely fails in this regard as applied by the Examiner.

The Examiner, therefore, does not answer the all important question as to what indicia would be used in order to allow a user to clean the bathroom floor. Will the user use the "HIS" towel or will the user use the "HERS" towel? We don't know. That is, there is absolutely no indicia indicating the particular application for which the cleaning purpose is intended, as claimed. The prior art clearly gives no teaching to use any indicia for "bathroom floor." Thus, the Examiner cannot accurately maintain that the indicia contained on the towel of *Carter et al.* indicates a claimed intended application for cleaning. Rather, the Examiner can only point to the fact that there is an indicia on one towel. This is not in dispute. Rather, what is in dispute is whether or not the single towel of *Carter et al.* teaches, as presently claimed, a plurality of cleaning articles dedicated to particular cleaning applications associated with the indicia borne thereon.

Applicant respectfully submits that it does not and that the Examiner's rejection is blatantly utilizing hindsight reconstruction. The Examiner has plainly applied the teachings of the Applicant against her. This is simply wrong and contrary to law. To establish a prima facie case of obviousness, three basic criteria must be met. First, there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or to combine reference teachings. Second, there must be a reasonable expectation of success. Finally, the prior art reference (or references when combined) must teach or suggest all the claim limitations. The

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teaching or suggestion to make the claimed combination and the reasonable expectation of success must both be found in the prior art, not in applicant's disclosure. MPEP 2143; *In re Vaeck*, 947 F.2d 488, 20 USPQ2d 1438 (Fed. Cir. 1991). Moreover, when an examiner relies on asserted general knowledge to negate patentability, as has happened here, that knowledge must be articulated and placed on the record. *See In re Lee*, 277 F.3d 1338, 1345, 61 USPQ2d 1430, 1433-35 (Fed. Cir. 2002). *See also In re Dembiczak*, 175 F.3d 994, 999, 50 USPQ2d 1614, 1617 (Fed. Cir. 1999). There is simply nothing in the primary reference of *Carter et al.* that suggests, much less teaches, the presently claimed invention.

Issues 2, 3 and 4:

- 2) Whether any of the remaining cited references, either combined with *Carter et al.* or otherwise in proper combination, teach the identification system which is claimed herein.
- 3) Whether any of the cited references in fact teach away from the identification system that which is claimed herein.
- 4) Whether, even if combined, the references as cited would render obvious the identification system that which is claimed herein.

It is well-established law that in order to find an invention obvious in light of a combination of references, there must be something present in the teachings of those references to suggest the claimed invention to one skilled in the art. *W.L. Gore and Assocs., Inc. v. Garlock, Inc.*, 721 Fed.2d 1540, 1551, 220 U.S.P.Q. 303, 311 (Fed. Circuit 1983) (citing *In re Bergel*, 292 Fed.2d 955, 956-57, 130 U.S.P.Q. 206, 208 (CCPA 1961)). Obviousness cannot be established by combining the teachings of the prior art to produce the claimed invention, absent some teaching or suggestion supporting the combination. Under §103,

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teachings of references can be combined *only* if there is some suggestion or incentive to do so. *ACS Hosp. Sys., Inc. v. Montefiore Hosp.*, 732 F.2d. 1572, 1577, 221 U.S.P.Q. 929, 933 (Fed. Cir. 1984) (emphasis original).

Further, it is established that where references, instead of suggesting the invention, seek or warn to avoid the suggestion, such references diverge from and teach away from the invention at hand and it is error to find obviousness based on such references. *In re Fine*, 837 Fed.2d 1071, 1074, 5 U.S.P.Q.2d 1596, 1599 (Fed. Circuit 1988) (citing *W.L. Gore and Assocs., Inc. v. Garlock, Inc.*, 721 Fed.2d 1540, 1550, 220 U.S.P.Q.2d 303, 311 (Fed. Circuit 1983), *cert denied* 469 U.S. 851 (1984)). Moreover, it is improper to pick and choose among individual parts of assorted prior art references as a mosaic to recreate a facsimile of the claimed invention. *Akzo N.V. v. U.S. Int.'l Trade Comm'n*, 808 Fed.2d. 1471, 1481, 1 U.S.P.Q. 2d 1241, 1246 (Fed. Circuit 1986) (quoting *W.L. Gore and Assocs., Inc. v. Garlock, Inc.*, 721 Fed.2d 1540, 1552, 220 U.S.P.Q. 303, 312 (Fed. Circuit 1983)).

The Examiner rejected claim 4 over *Carter et al.*, as discussed above, and in further view of *Pirraglia et al.* under 35 U.S.C. §103(a), contending that the latter reference shows the idea of making the outline of a towel in the shape of a person. But *Pirraglia et al.*, at best, shows a single angel. Since it cannot be disputed that angels do not require cleaning, *Pirraglia et al.* cannot be viewed as disclosing a specific intended cleaning application having an indicia in the form thereof. It certainly does not show a specific intended cleaning application for cleaning a surface selected from a group consisting essentially of dishes, glassware, cooking pots and pans, kitchen counters, kitchen cabinets, kitchen sinks, dining tables and other surfaces that are used during the food preparation process, toilets, tubs, sinks, floors, walls, cars, boats, windows and tables that is capable of distinguishing one from another cleaning application, nor does it disclose a plurality of cleaning articles or applications. Accordingly, *Pirraglia et al.* suffers from the same deficiency as *Carter et al.* and there is nothing in either of the references suggesting the combination.

The Examiner rejected claims 5 and 13 under 35 U.S.C. §103(a) as being unpatentable over *Carter et al.* as applied above, and in further view of *Inteso*. The Examiner noted that it

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would have been obvious in view of the embroidery of *Inteso* to modify *Carter et al.* by making the indicia raised. Apart from the fact that here in nothing in either of the references suggesting the combination, in view of the otherwise allowability of claims 1 and 6, from which claims 5 and 13 ultimately depend, Applicant contends this combination is improper.

The Examiner rejected claims 5, 11 and 13 under 35 U.S.C. §103(a) as being unpatentable over *Carter et al.*, as applied above and in further view of *Brach Jr., et al.* The Examiner contended that *Brach Jr., et al.* further teaches the idea of making the indicia raised, which would create a more aesthetically pleasing display. Moreover, the Examiner contended that *Brach Jr., et al.* teaches the idea of making the indicia recessed, which the Examiner likewise contended would be a more aesthetic display. Again, the Applicant notes there is no suggestion to make the combination in either of the references and that these claims depend from otherwise allowable claims 1 and 6.

The Examiner rejected claims 1-3, 6-10, 12 and 14-18 under 35 U.S.C. §103(a) as being unpatentable over “Scotch-Brite” scour pads with indicia. The Examiner’s rejections are without merit. As an initial matter, the Applicant points out that the Scotch-Brite cookware sponge in no way, shape or form bears indicia of an intended cleaning application. Once removed from its package, the wrapper is thrown away. What serves as the “indicia” indicating the claimed cleaning application then? Nothing.

Moreover, it is clear that simply the reference to the other product, that is, the “Scotch-Brite Cookware Sponge,” provides absolutely no evidence that this other product or its packaging bear indicia of any kind. In fact, the Examiner has offered no evidence that the “Scotch-Brite Cookware Sponge” that is said to be used on tubs does, in fact, bear any indicia whatsoever. Moreover, the Examiner has failed to produce any evidence whatever that the “Scotch-Brite Cookware Sponge” bears indicia corresponding to and relating to its intended cleaning application. Thus, the Examiner’s rejection on the basis of the Scotch-Brite Scour Pads must fail as failing to teach a plurality of cleaning articles, each having separate indicia corresponding to a separate intended cleaning application. There is absolutely no reference

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whatever in any of the teachings of the Scotch-Brite packaging or the combined references to reach the claimed invention.

The "Scotch-Brite" scour pads do not suggest, teach or indicate the desirability of providing a plurality of cleaning articles, each having a different cleaning application for cleaning a surface selected from a group consisting essentially of dishes, glassware, cooking pots and pans, kitchen counters, kitchen cabinets, kitchen sinks, dining tables and other surfaces that are used during the food preparation process, toilets, tubs, sinks, floors, walls, autos, boats, windows and furniture. Specifically, the reference itself teaches that the "Scotch-Brite" scour pads with identical indicia thereon can be used in "all heavy duty jobs like cast iron pots, stoves, bumpers, broilers, garden tools, grates, grills and white-wall tires." If anything, the reference teaches that every cleaning article should be the same! The other "Scotch-Brite" products recited are different product lines sold as separate products. They are not provided as a plurality of differently marked products bearing different indicia, each indicia signifying a different cleaning application.

The Examiner rejected claim 4 under 35 U.S.C. §103(a) as unpatentable over "Scotch-Brite" as set forth above, in further view of *Demner*, showing the figure of the cleaning article in the shape of the article to be cleaned. Applicant admits that the *Demner* reference teaches a cleaning article having the shape of the intended cleaning application. However, *Demner* does not disclose a plurality of such articles having a different intended cleaning application for cleaning a surface selected from a group consisting essentially of dishes, glassware, cooking pots and pans, kitchen counters, kitchen cabinets, kitchen sinks, dining tables and other surfaces that are used during the food preparation process, toilets, tubs, sinks, floors, walls, autos, boats, windows and furniture. Nor do its teachings suggest to motivate one having skill in the art to effect such system.

The Examiner rejected claims 5 and 13 under 35 U.S.C. §103(a) as unpatentable over "Scotch-Brite" in further view of *Rogers et al.* The Applicant notes that there is no teaching, motivation or suggestion in either of *Demner* or "Scotch-Brite" to render the combination

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described therein. Moreover, claims 5 and 13 ultimately depend from otherwise allowable independent claims.

The Examiner rejected claims 5, 11 and 13 under 35 U.S.C. §103 as being unpatentable over "Scotch-Brite" as applied above in further view of *Brach Jr. et al.* Applicant notes that in view of the otherwise allowability of claims 1 and 6 from which claims 5, 11 and 13 ultimately depend, there is no motivation, suggestion or teaching to otherwise reach the invention disclosed therein.

Issue 5:

5) Whether objective evidence of non-obviousness overcomes the rejections for obviousness

In *Graham v. John Deere Company of Kansas City*, 383 U.S. 1, 17-18, 86 S. Ct. 684, 694 (1966), the United States Supreme Court set forth the following guidelines for making a 35 USC §103 determination:

Under §103, the scope and content of the prior art are to be determined; differences between the prior art and the claims at issue are to be ascertained; and the level of ordinary skill in the pertinent art resolved. Against this background, the obviousness or nonobviousness of the subject matter is determined. Such secondary considerations as commercial success, long felt but unsolved needs, failure of others, etc., might be utilized to give light to the circumstances surrounding the origin of the subject matter sought to be patented. As indicia of obviousness or nonobviousness, these inquiries may have relevancy.

Attached to the Response filed by the Applicant on March 2, 2004 were the Declaration of Applicant and photographs of samples of recently introduced products from 3M showing, *inter alia*, a package having a plurality of cleaning articles, at least one of which cleaning article bears indicia indicating one intended cleaning application and another cleaning article bearing indicia indicating a separate intended cleaning application. For example, the first of the three pads sold in the package shows fish. The second of the pads shows pots and pans. The first bears a cleaning indication for fish tanks and pet-related supplies and the other indicia for food utensils. This information relating to the commercial introduction and associated

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success of the claimed identification system demonstrates the non-obviousness of the claimed invention.

XII. Conclusion


Applicant submits that the rejected claims are allowable under 35 U.S.C. §103, and are not obvious to those skilled in the art in light of the references cited by the Examiner. Specifically, Applicant submits that the rejected claims are in fact allowable over the cited references. The references of record do not teach or in any way suggest the novel identification system having a plurality of cleaning articles, each bearing an indicia indicating a specific cleaning application differing from the other cleaning articles, thereby allowing ready identification and lower risk of cross-contamination.

Respectfully submitted,

GIGI C. GORDON

By: PRICE, HENEVELD, COOPER, DEWITT & LITTON, LLP

June 7, 2004
Date


Steven L. Underwood
Registration No. 35 727
695 Kenmoor Avenue SE, P.O. Box 2567
Grand Rapids, Michigan 49501
(616) 949-9610

SLU/p



APPENDIX A

APPENDIX OF CLAIMS ON APPEAL (37 CFR §1.192(c)(9))

1. An identification system for identifying and distinguishing individual cleaning articles for cleaning a surface selected from a group consisting essentially of dishes, glassware, cooking pots and pans, kitchen counters, kitchen cabinets, kitchen sinks, dining tables and other surfaces that are used during the food preparation process, toilets, tubs, sinks, floors, walls, cars, boats, windows and tables, each of said cleaning articles selected from the group consisting essentially of sponges, wipes, towels, rags, cloths, blotters and metallic and non-metallic scrubbers, the identification system comprising a plurality of said cleaning articles, each cleaning article intended for and corresponding to a different specific intended cleaning application, each of the cleaning articles including an external surface, a cleaning surface disposed on the external surface for a specific intended cleaning application, and identifying indicia constituting a visually distinguishing external feature for specifically identifying the specific intended cleaning application of each of the plurality of cleaning articles, the identifying indicia distinguishing each of the cleaning articles for different intended cleaning applications one from another and specifying the specific intended cleaning application of each of the plurality of cleaning articles.
2. The identification system of Claim 1 wherein the indicia comprises text affixed to the external surface of each of the plurality of cleaning articles, the text describing the specific intended cleaning application.
3. The identification system of Claim 1 wherein the indicia comprises identifiable symbols affixed to the external surface of each of the plurality of cleaning articles, the identifiable symbols representing images descriptive of the specific intended cleaning application.
4. The identification system of Claim 1 wherein each of the plurality of cleaning articles has an outer silhouette, the indicia comprising an identifiable shape formed by the silhouette of each of the plurality of cleaning articles, the identifiable shape representing images descriptive of the specific intended cleaning application.

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5. The identification system of Claim 1 wherein the indicia comprises indicia that is raised relative to the external surface for tactile identification.

6. An identification system for identifying and distinguishing individual cleaning articles for cleaning a surface selected from a group consisting essentially of dishes, glassware, cooking pots and pans, kitchen counters, kitchen cabinets, kitchen sinks, dining tables and other surfaces that are used during the food preparation process, toilets, tubs, sinks, floors, walls, cars, boats, windows and tables, the identification system comprising a plurality of said cleaning articles, each of said cleaning articles selected from the group consisting essentially of sponges, wipes, towels, rags, cloths, blotters and metallic and non-metallic scrubbers, each of the plurality of cleaning articles being intended for and corresponding to a specific cleaning application and including an external surface, a cleaning surface disposed on the external surface of each of the plurality of cleaning articles for a specific intended cleaning location, and identifying indicia constituting a visually distinguishing feature for identifying the specific intended cleaning application of each of the plurality of cleaning articles, the indicia including a visually discernible identification associated with the cleaning article for distinguishing each of the cleaning articles for different intended cleaning applications one from another, for specifying the specific intended cleaning application of each of the plurality of cleaning articles and for expressly associating the specific intended cleaning application of each of the plurality of cleaning articles with the specific intended cleaning application of each of the plurality of cleaning articles.

7. The identification system of Claim 6 wherein the identifying means comprises text affixed to the external surface of each of the plurality of cleaning articles, the text communicating the specific intended application of each of the plurality of cleaning articles.

8. The identification system of Claim 7 wherein each of the plurality of cleaning articles bears a different indicia representing a different and distinguishable visually discernible identification indicating a different intended cleaning application.

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9. The identification system of Claim 7, wherein the indicia is permanently affixed to the cleaning article.

10. The identification system of Claim 7, wherein the indicia is an indelible and non-toxic dye of a contrasting color to that of the cleaning article.

11. The identification system of Claim 7, wherein the indicia is a visually discernible material of a contrasting color to that of the cleaning article embedded into the cleaning article to form the indicia identifying the specific intended application of each of the plurality of cleaning articles.

12. The identification system of Claim 7, wherein the indicia is formed by a lithographic, printed or stenciled process.

13. The identification system of Claim 7, wherein the indicia is formed by a raised surface relative to the external surface.

14. A method of distinguishing cleaning a surface selected from a group consisting essentially of dishes, glassware, cooking pots and pans, kitchen counters, kitchen cabinets, kitchen sinks, dining tables and other surfaces that are used during the food preparation process, toilets, tubs, sinks, floors, walls, cars, boats, windows and tables, articles for cleaning a non-human surface, one from another, wherein each of said cleaning articles is selected from the group consisting essentially of sponges, wipes, towels, rags, cloths, blotters and metallic and non-metallic scrubbers, the method comprising the steps of providing a plurality of said cleaning articles, each intended for and corresponding to a specific intended cleaning application, selecting for each of the plurality of cleaning articles a visually discernible indicia associated with the cleaning article and with the intended cleaning application, the indicia being different from the indicia of the other of the plurality of cleaning articles intended for different intended cleaning applications so as to facilitate visual determination of the intended cleaning application and discrimination of the cleaning articles

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intended for different intended cleaning applications one from the other, and applying the indicia to the cleaning articles.

15. The method of Claim 14, wherein the first and second indicia are written words indicating the intended use of the first and second one of the plurality of cleaning articles, respectively.

16. The method of Claim 14, wherein the first and second indicia are symbols indicating the first and second intended use of each of the first and second one of the plurality of cleaning articles, respectively.

17. The method of Claim 14, wherein the first and second indicia are permanently affixed to each of the first and second one of the plurality of cleaning articles, respectively.

18. An identification system for identifying and distinguishing individual cleaning articles for cleaning a surface selected from a group consisting essentially of dishes, glassware, cooking pots and pans, kitchen counters, kitchen cabinets, kitchen sinks, dining tables and other surfaces that are used during the food preparation process, toilets, tubs, sinks, floors, walls, cars, boats, windows and tables, each of said cleaning articles selected from the group consisting essentially of wiping and absorbent devices, the identification system comprising a plurality of said individually unique cleaning articles, each cleaning article intended for and corresponding to a different specific intended cleaning application, each of the cleaning articles including an external surface, a cleaning surface disposed on the external surface for a specific intended cleaning application, and identifying indicia constituting a visually distinguishing external feature for expressly identifying the specific intended cleaning application of each of the plurality of cleaning articles, the identifying indicia specifying the specific intended cleaning application of each of the plurality of cleaning articles, wherein the specific intended cleaning application for each one of the plurality of cleaning articles is distinguished from the others of the plurality of cleaning articles to prevent interchange between specific intended cleaning applications.